

2012 DEC -5 AM 9:30

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

CELA

FIRST GENERAL COUNSEL'S REPORT

AUDIT REFERRAL: 12-07
DATE REFERRED: August 15, 2012
LAST RESPONSE RECEIVED: November 15, 2012
DATE ACTIVATED: November 26, 2012

EXPIRATION OF SOL: Earliest April 5, 2013
Latest October 24, 2013

SOURCE: Internally Generated

RESPONDENTS: The Legacy Committee Political Action Committee
and James Lacy in his official capacity as treasurer

RELEVANT STATUTES
AND REGULATIONS: 2 U.S.C. § 431(17)
2 U.S.C. § 434(b)(6)(B)(iii) and (g)
11 C.F.R. § 100.22
11 C.F.R. § 104.3(b)(3)(vii)
11 C.F.R. § 104.4(a), (b) and (c)

INTERNAL REPORTS CHECKED: Audit Documents
Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The Audit Division referred this matter to the Office of General Counsel following an audit of the activity of The Legacy Committee Political Action Committee ("LCPAC") covering the period from January 1, 2007 through December 31, 2008. See 2 U.S.C. § 438(b). See Audit Referral at Attachment 1. The Final Audit Report ("FAR"), approved by the Commission on July 31, 2012, contained a finding that LCPAC failed to timely file 24- and 48-hour notices of independent expenditures and failed to properly disclose independent expenditures on Schedule

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1 E of its reports filed with the Commission.¹ On the basis of the FAR, we recommend that the
2 Commission open a Matter Under Review, find reason to believe that LCPAC and James Lacy in
3 his official capacity as treasurer ("Respondents") violated 2 U.S.C. § 434(b)(6)(B)(iii) and (g)
4 and 11 C.F.R. § 104.4(a), (b) and (c), and enter into pre-probable cause conciliation.

5 **II. BACKGROUND**

6 LCPAC is a multi-candidate committee that has been filing reports with the Commission
7 since December 2006. Pursuant to 2 U.S.C. § 438(b), the Commission authorized an audit of
8 LCPAC's activity during the period from January 1, 2007 through December 31, 2008. During
9 the audit, the Commission examined whether LCPAC properly reported its expenditures,
10 including those made in connection with 60 separate direct mail fundraising appeals, a number of
11 which included express advocacy. LCPAC originally reported these expenditures as operating
12 expenditures. After discussions with the Commission's Reports Analysis Division, LCPAC
13 disclosed over \$1 million in independent expenditures on Schedule E of its amended reports and
14 filed, belatedly, most of the 24- and 48-hour notices where such notices would have been
15 required. See Attachment 1 at 3. The Audit Division determined that some, but not all, of the
16 fundraising letters disclosed as independent expenditures in LCPAC's amended reports
17 contained express advocacy and should have been timely disclosed through 24- and 48-hour
18 notices. *Id.* at 3-4.

19 During the audit process, Respondents asserted that the purpose of their direct mail letters
20 was fundraising, not supporting or opposing candidates in elections, and that as a result their
21 spending did not require reporting as independent expenditures. *Id.* at 2, 4-5. Rejecting this

¹ The FAR is available on the Commission's website. See *Audit Report – The Legacy Committee Political Action Committee*, http://www.fec.gov/audits/2008/The_Legacy_Committee_Political_Action_Committee/FinalAuditReportoftheCommission1223257.pdf.

1 position, in part, on July 31, 2012, the Commission approved an audit finding that LCPAC did
2 not timely file 24- and 48-hour notices for independent expenditures totaling \$281,439, did not
3 file 24-hour notices for independent expenditures totaling \$17,571, and did not properly disclose
4 independent expenditures totaling \$123,326 prior to payment as memo entries on Schedule E and
5 as reportable debts on Schedule D (Debts and Obligations).² See Attachment 1 at 2, 5.

6 The Audit Division referred this matter to this Office on August 15, 2012. On August 27,
7 2012, this Office notified Respondents of the referral in accordance with the Commission's
8 policy regarding notification in non-complaint generated matters. 74 Fed. Reg. 38617 (Aug. 4,
9 2009). Respondents responded to the Commission's notification on November 15, 2012,
10 reiterating their position that the communications were intended to raise funds, and not to
11 "persuade the voters to vote in a primary or general election during the period involved."
12 Response at 1.

13 **III. FACTUAL AND LEGAL ANALYSIS**

14 The Federal Election Campaign Act of 1971, as amended, (the "Act") defines
15 "independent expenditure" as an expenditure by a person expressly advocating the election or
16 defeat of a clearly identified federal candidate that is not made in concert or cooperation with or
17 at the request or suggestion of such candidate, the candidate's authorized political committee, or
18 their agents, or a political party committee or its agents. 2 U.S.C. § 431(17). Under the
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² On June 7, 2012, the Commission considered but failed by a vote of 3-3 to approve an audit finding that LCPAC did not timely file 24- and 48-hour notices for independent expenditures totaling \$374,327, did not file 24-hour notices for independent expenditures totaling \$17,571, and did not properly disclose independent expenditures totaling \$293,575 prior to payment as memo entries on Schedule E and as reportable debts on Schedule D (Debts and Obligations). See Attachment 1 at 5; Commission Certification for A09-22 (The Legacy Committee Political Action Committee) (June 11, 2012).

Commission's regulations at 11 C.F.R. § 100.22(a), express advocacy includes phrases such as "vote for the President" or "defeat" accompanied by a picture of one or more candidates. It also includes campaign slogans or individual words, "which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)." *Id.*; *see also* 11 C.F.R. § 100.22(b).

Every political committee that makes independent expenditures must report those expenditures in its regularly scheduled disclosure reports in accordance with 11 C.F.R. § 104.3(b)(3)(vii), 11 C.F.R. § 104.4(a). Such a political committee must disclose on Schedule E the name of a person who receives any disbursement during the reporting period in an aggregate amount or value in excess of \$200 within the calendar year in connection with an independent expenditure by the reporting committee. The report also must disclose the date, amount, and purpose of any such independent expenditure and include a statement that indicates whether such independent expenditure is in support of or in opposition to a candidate, as well as the name and office sought by such candidate. 2 U.S.C. § 434(b)(6)(B)(iii); 11 C.F.R. §§ 104.3(b)(3)(vii), 104.4(a). Independent expenditures of \$200 or less do not need to be itemized, though the committee must report the total of those expenditures on line (b) of Schedule E. *Id.* Further, a debt or obligation over \$500 must be reported as of the date on which the debt or obligation is incurred. 11 C.F.R. § 104.11(b). Independent expenditures made (*i.e.*, publicly disseminated) prior to payment should be disclosed as memo entries on Schedule E and as reportable debt on Schedule D (Debts and Obligations). Committees are required to maintain records that provide information with sufficient detail so that the reports may be verified. 11 C.F.R. § 104.14(b)(1).

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1 Under certain circumstances, independent expenditures made by a political committee
2 require additional immediate disclosure prior to disclosure on the committee's regularly
3 scheduled disclosure reports. A political committee that makes or contracts to make independent
4 expenditures aggregating \$10,000 or more in connection with a given election at any time during
5 a calendar year up to and including the 20th day before the date of an election is required to file a
6 report describing the expenditures within 48 hours. 2 U.S.C. § 434(g)(2)(A); 11 C.F.R.
7 § 104.4(b)(2). These reports, known as 48-hour notices, must be filed by the end of the second
8 day "following the date on which a communication that constitutes an independent expenditure
9 is publicly distributed or otherwise publicly disseminated." 11 C.F.R. § 104.4(b)(2). A
10 committee is required to file additional reports within 48 hours after each time it makes or
11 contracts to make independent expenditures aggregating an additional \$10,000. 2 U.S.C.
12 § 434(g)(2)(B); 11 C.F.R. § 104.4(b)(2).

13 A political committee that makes or contracts to make independent expenditures
14 aggregating \$1,000 or more in connection with a given election after the 20th day but more than
15 24 hours before the date of an election is required to file a report describing the expenditures
16 within 24 hours. 2 U.S.C. § 434(g)(1)(A); 11 C.F.R. § 104.4(c). These reports, known as 24-
17 hour notices, must be filed within 24 hours "following the date on which a communication that
18 constitutes an independent expenditure is publicly distributed or otherwise publicly
19 disseminated." 11 C.F.R. § 104.4(c). A political committee must file additional reports within
20 24 hours after each time it makes or contracts to make independent expenditures aggregating an
21 additional \$1,000. 2 U.S.C. § 434(g)(1)(B); 11 C.F.R. § 104.4(c).

22 As set forth in the Referral, *see* Attachment 1 at 5, LCPAC failed to file timely 24- and
23 48-hour notices for independent expenditures totaling \$281,439 and failed to file 24-hour notices

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1 for independent expenditures totaling \$17,571, as required by 2 U.S.C. § 434(g) and 11 C.F.R.
2 § 104.4(b) and (c), and did not properly disclose independent expenditures totaling \$123,326
3 prior to payment as memo entries on Schedule E and as reportable debts on Schedule D (Debts
4 and Obligations), as required by 2 U.S.C. § 434(b)(6)(B)(iii) and 11 C.F.R. § 104.4(a).³

5 Based on the foregoing, we recommend that the Commission find reason to believe that
6 Respondents violated 2 U.S.C. § 434(b)(6)(B)(iii) and (g) and 11 C.F.R. § 104.4(a), (b) and (c).

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³ As noted, Respondents asserted during the audit process that the purpose of their direct mail letters was fundraising, not intervening in elections, and that their spending did not require reporting as independent expenditures. The Commission, however, has determined that LCPAC's communications comprising the referred amounts constitute express advocacy and thus required reporting as independent expenditures.

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V. RECOMMENDATIONS

1. Open a MUR;
2. Find reason to believe that The Legacy Committee Political Action Committee and James Lacy in his official capacity as treasurer violated 2 U.S.C. § 434(b)(6)(B)(iii) and (g) and 11 C.F.R. § 104.4(a), (b) and (c);
3. Approve the attached Factual and Legal Analysis;
4. Enter into conciliation with The Legacy Committee Political Action Committee and James Lacy in his official capacity as treasurer prior to a finding of probable cause to believe;

⁵ LCPAC thereby filed 80.5% of the \$299,010 in notices that comprise the overall untimely and unfiled notices in the referral (\$281,439 untimely plus \$17,571 unfiled) prior to the election. LCPAC filed the remainder of the untimely notices, totaling \$40,617, on November 4, 2008, the date of the election.

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3 6. Approve the appropriate letter.
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6 Anthony Herman
7 General Counsel

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9
10 12-5-12
11 Date

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